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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

ROBERT CHRISTIAN CHAIDEZ,

Defendant and Appellant.

D074872

(Super. Ct. No. SCD181666)

APPEAL from an order of the Superior Court of San Diego County, Melinda J. Lasater, Judge. Reversed and remanded with directions.

Theresa Osterman Stevenson, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Steve Oetting and Warren J. Williams, Deputy Attorneys General, for Plaintiff and Respondent.

Robert Christian Chaidez appeals the trial court's denial of two of his petitions to recall his sentence under Proposition 36 (Pen. Code,¹ § 1170.126). Chaidez contends the court erred in denying his request to resentence two, nonserious felony convictions and that upon remand the trial court should be directed to permit him to seek dismissal of two five-year priors (§ 667, subd. (a)). The People agree the case should be remanded to permit the court to consider the petition for resentencing on a count-by-count basis. They maintain, however, that we should not direct the trial court to exercise its discretion to strike the serious felony priors under Senate Bill No. 1393.

As we will discuss, we agree the trial court erred in concluding the presence of two convictions for first degree burglary made Chaidez ineligible for resentencing on the nonserious felony counts. We will remand the case to permit the court to properly exercise its discretion to resentence the nonserious felonies. If the court ultimately grants resentencing on those counts, we will direct the court to permit Chaidez to seek dismissal of the serious felony priors under section 1385.²

PROCEDURAL BACKGROUND

In 2006, Chaidez was convicted of two counts of first-degree residential burglary (§§ 459 and 460), one count of receiving stolen property (§ 496), and one count of vehicle theft (Veh. Code, § 10851). Chaidez was sentenced to an indeterminate term of 60 years to life in prison. The sentence calculation included 25 years to life for each of

¹ All further statutory references are to the Penal Code unless otherwise specified.

² The facts of the underlying offenses are not relevant to the issues raised on this appeal. We will omit the traditional statement of facts.

the two counts of burglary; 25 years to life for receiving stolen property (stayed under § 654); 25 years to life for vehicle theft (imposed concurrently); and five years for each of the serious felony prior convictions.

In 2016 Chaidez filed a petition to recall the sentence under section 1170.126, which the superior court denied as untimely. This court affirmed the denial. In 2018, Chaidez filed a second petition seeking to explain the reasons for his delay.

The trial court denied the second petition without addressing the issue of delay. The court concluded the presence of the two first degree burglary counts rendered Chaidez ineligible for resentencing on the two nonserious felony convictions.

In October 2018, Chaidez filed a third petition, this time citing *People v. Johnson* (2015) 61 Cal.4th 674. The trial court again denied the petition on the merits.

DISCUSSION

A. Proposition 36

Proposition 36 changes Three Strikes sentencing to preclude a third strike life sentence for a new conviction for a felony, which is neither violent or serious. (*People v. Yearwood* (2013) 213 Cal.App.4th 161, 167.) In the case of persons like Chaidez, who are serving a life term imposed under the Three Strikes Law prior to Proposition 36. The Proposition provides the opportunity to petition the trial court to resentence the nonserious offenses. (*Yearwood*, at pp.167-168; § 1170.126, subd. (a).)

In ruling on the petition for resentencing, the trial court must engage in a count-by-count analysis. Thus, where there are serious/violent felony convictions as well as nonserious felony convictions, the court may resentence the nonserious counts even

though the sentences on the serious/violent felony counts remain. (*People v. Johnson*, *supra*, 61 Cal.4th at p. 682.)

The parties to this appeal correctly agree the trial court erred in declining to reconsider the nonserious felony life term sentences. Accordingly, we must remand the case to the trial court to determine the merits of the petition. We are aware there are remaining issues of undue delay and dangerousness the trial court must determine when it analyzes the petition. We express no opinion regarding the outcome of such analysis.

B. Senate Bill No. 1393

Since the convictions in this case, the Legislature amended section 1385 to permit the trial courts to dismiss serious felony priors (§ 667, subd. (a)) in the furtherance of justice. Although the convictions here were final before the enactment of Senate Bill No. 1393, the bill applies to resentencing which occur after the effective date of the legislation. (*People v. Hubbard* (2018) 27 Cal.App.5th 9, 13-14.)

The People argue it is uncertain whether there will be a resentencing. The issues of undue delay and dangerousness remain to be decided. Certainly, it is possible the court on remand might deny the petition again. In such case, there would not be a resentencing and thus Senate Bill No. 1393 would not be implicated. While it is possible there will not be a resentencing after remand, it is also entirely possible the trial court may find resentencing is appropriate. In that case, Senate Bill No. 1393 would be applicable. We think the prudent course here is to make our directions to the trial court conditional. If the trial court, upon analysis of the merits of the petition, determines to grant resentencing then it must afford Chaidez the opportunity to move to dismiss one or

more of the five-year priors. Again, we express no opinion on how the court should rule on such request.

DISPOSITION

The order denying petitions under section 1170.126 is reversed. The matter is remanded with directions to hold a hearing on the petitions consistent with the views expressed in this opinion, and to decide the petitions on the merits. If the court grants resentencing of the nonserious felony sentences, the court is directed to allow Chaidez to seek dismissal of the serious felony prior conviction under section 1385. If the court modifies the sentences, it is directed to amend the abstract of judgment and to forward the amended abstract to the Department of Corrections and Rehabilitation.

HUFFMAN, J.

WE CONCUR:

BENKE, Acting P. J.

HALLER, J.